

BRB No. 97-1316

ELLEN J. DAY
(Widow of DONALD DAY)

Claimant-Petitioner

v.

BATH IRON WORKS CORPORATION

Self-Insured
Employer-Respondent

and

COMMERCIAL UNION INSURANCE
COMPANY

Carrier-Respondent

DATE

ISSUED:

DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Ronald W. Lupton (Stinson, Lupton, Weiss & Gabree P.A.), Bath, Maine, for claimant.

Kevin M. Gillis (Trough, Heisler & Piampiano), Portland, Maine, for Commercial Union Insurance Company.

Stephen Hesser (Norman, Hanson & DeTroy), Portland, Maine, for self-insured employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-357) of Administrative Law Judge Jeffrey Tureck rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

The decedent, a spray painter and machinist for employer, filed a disability claim on March 23, 1994, for pulmonary problems allegedly due to work-related asbestosis. He died on October 4, 1994, from lung disease. Subsequently, his widow filed a claim for death benefits on October 15, 1994. In his Decision and Order, the administrative law judge found that Dr. Craighead's opinion is sufficient to establish rebuttal of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a). After crediting Dr. Craighead's opinion over the contrary opinions of Drs. Bates and Pusch, the administrative law judge found that there was no causal relationship between the decedent's work-related asbestos exposure and the disability and death. Consequently, he denied disability and death benefits. On appeal, claimant challenges the administrative law judge's denial of disability and death benefits. Both self-insured employer and carrier filed response briefs, urging affirmance.

Section 20(a) of the Act presumes, in the absence of substantial evidence to the contrary, that claims for disability and death benefits come within the provisions of the Act, *i.e.*, that the disability and death were work-related. See *Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11 (CRT)(1st Cir. 1982). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that the decedent's disability and death were not caused, aggravated, or accelerated by his employment. See *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991)(*en banc*), *aff'd sub nom. Ins. Co. of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993). If employer presents specific and comprehensive evidence sufficient to sever the connection between the disability and death and the employment, the presumption no longer controls and the issue of causation must be resolved on the whole body of proof. See *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997). The Board has held that if a work-related condition hastens death, the death is work-related. *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); *Woodside v. Bethlehem Steel Corp.*, 14 BRBS 601 (1982)(Ramsey, C.J. dissenting).

After consideration of claimant's arguments on appeal and the administrative law judge's decision in light of the record evidence, we affirm the administrative law judge's denial of disability and death benefits. The administrative law judge found that the decedent had work-related asbestosis. The administrative law judge properly found, however, that Dr. Craighead's opinion, that the decedent's disability was in no way related to asbestosis, and that the decedent's death was not caused, contributed to, aggravated, accelerated or hastened by occupational asbestosis, is sufficient to establish rebuttal of the Section 20(a) presumption as it is in accordance with law. See *Fineman*, 27 BRBS at 104; *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988); *Woodside*, 14 BRBS at 601; Decision and Order at 4; Emp. Ex. 20 at 14-15. Contrary to claimant's contention, the administrative law judge was not required to discredit the opinion of Dr. Craighead on the basis that he is employer's expert. Furthermore, claimant's remaining challenges to Dr. Craighead's opinion lack merit as the fact that objective medical evidence established that the decedent had asbestosis is irrelevant to the causation issue and as Dr. Craighead diagnosed asbestosis but did not find that it was related to the decedent's disability and death.

After properly finding that Dr. Craighead's opinion was sufficient to establish rebuttal, the administrative law judge acted within his discretion in crediting Dr. Craighead's opinion over the contrary opinions of Drs. Bates and Pusch based on Dr. Craighead's expertise.¹ See *Sprague*, 688 F.2d at 862, 15 BRBS at 11 (CRT); *Phillips*, 22 BRBS at 94; Decision and Order at 4-7. While Drs. Bates and Pusch believed that the cause of death was due to asbestosis and acute alveolar damage, Dr. Craighead testified that the cause of death was due to bronchiolitis obliterans and organizing pneumonia, and not caused, contributed to, aggravated, accelerated, or hastened by occupational asbestos exposure. Cl. Exs. 33 at 11, 16, 36 at 14; Emp. Ex. 20 at 14-15. Moreover, while claimant asserted that the decedent had been disabled since April 1989, the administrative law judge noted that the decedent did not complain of respiratory problems to Dr. Kline until late 1993 and was able to work until 1994. Decision and Order at 7; Cl. Ex. 34 at 13-15. Hence, the

¹The administrative law judge noted that Dr. Craighead is an expert in the field of pathology and has unique experience and knowledge concerning asbestosis as he chaired the Pneumoconiosis Committee of the College of American Pathologists and National Institute of Occupational Safety and Health which drafted, "The Pathology of Asbestos Associated Disease of the Lungs and Pleural Cavities: Diagnostic Criteria and Grading Schemes." In addition, Dr. Craighead has published numerous other articles, book chapters, abstracts, and has edited books relevant to the disease of asbestosis.

administrative law judge rationally found that the decedent was not disabled by his asbestosis during this time period, and concluded that decedent's pulmonary problems between late 1993 and 1994 could not be related to asbestosis, based on his rapidly declining health as both Drs. Craighead and Bates characterized asbestosis as a slowly progressing disease and as Dr. Craighead opined that the decedent's disability was in no way related to asbestos exposure.² See generally *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673 (1st Cir. 1998); Decision and Order at 7; Cl. Ex. 33 at 17; Emp. Ex. 20 at 14. Moreover, the administrative law judge was not required to credit the opinions of Drs. Bates and Pusch as treating physicians with controlling weight. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Phillips*, 22 BRBS at 94. Any error in the administrative law judge's failure to consider the lay testimony of claimant and Mr. Lahr, the decedent's former employee, is harmless as the testimony does not establish that the decedent's disability was work-related. Cl. Ex. 35 at 6-8; Tr. at 23, 26.

Accordingly, the administrative law judge's Decision and Order denying disability and death benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

²Contrary to claimant's contention, Dr. Craighead was aware of all of the findings by Drs. Bates and Pusch after reviewing their depositions. CU-1. Hence, the instant case is distinguishable from the case of *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994), where the administrative law judge unreasonably relied upon an opinion of a single physician, who was unaware of all of the medical evidence of record.

REGINA C. McGRANERY
Administrative Appeals Judge